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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 202.

NEW AMSTERDAM CASUALTY COMPANY,
PETITIONER,

VS.

THE MIAMI CONSERVANCY DISTRICT,
RESPONDENT.

RESPONDENT'S BRIEF OPPOSING ISSUE OF WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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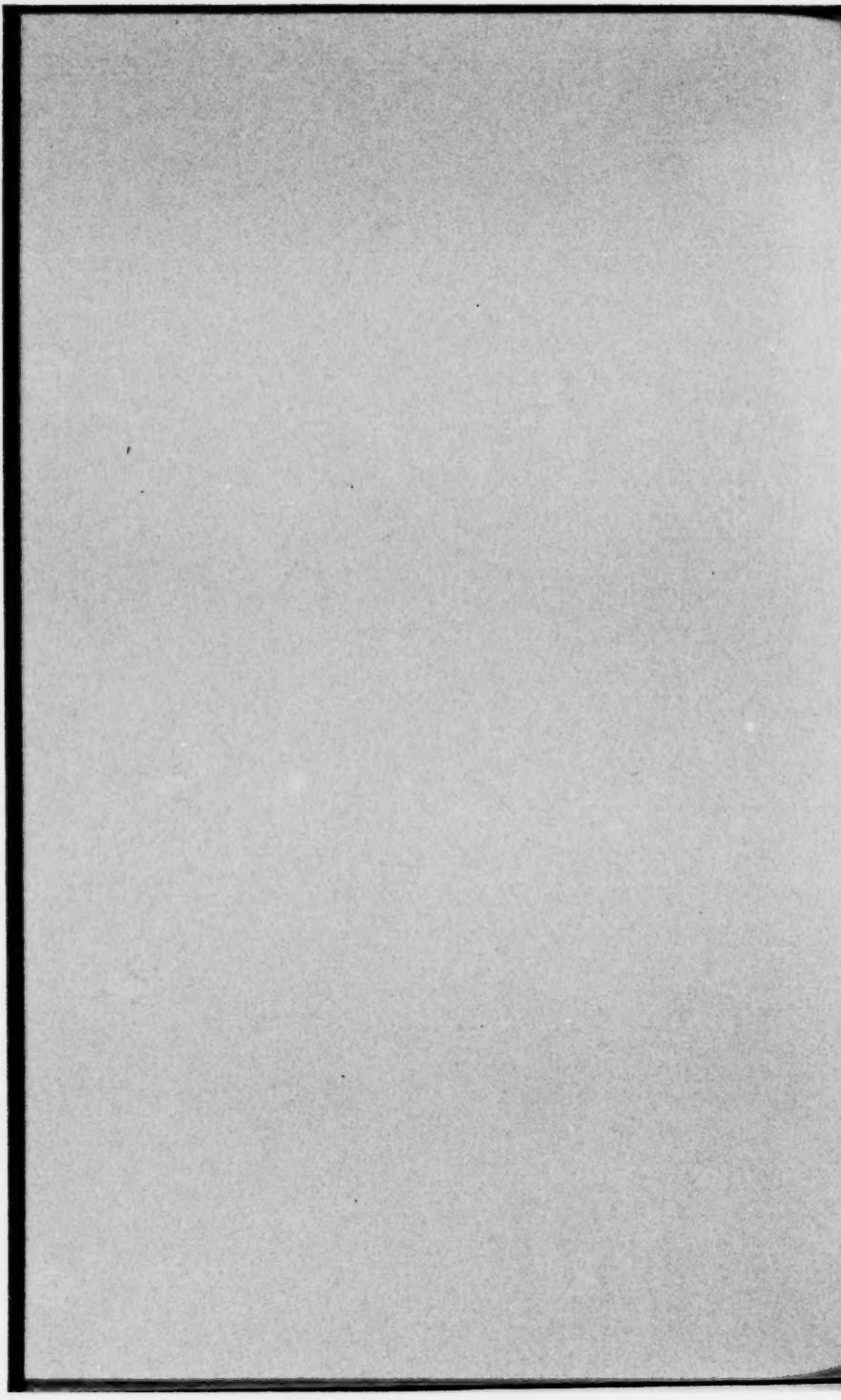

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I.

BASIS OF JURISDICTION.

Respondent agrees that if the prayer of the petition for writ of certiorari appeals to the discretion of this court, it has jurisdiction to issue the writ under Section 240(a), of the Judicial Code as amended, by the Act of February 13, 1925, C. 229 (43 Stat. 938, 28 U. S. C. A., Sec. 347).

II.

BASIC QUESTIONS INVOLVED.

As counsel understand this case, it is primarily and fundamentally one involving the construction of a contract. There is no debatable question of law involved. It is dependent upon the particular working of the documents and the circumstances involved in this specific transaction. It was so considered by the District Court (*infra*, page 10) and the Circuit Court of Appeals (*infra*, page 12). If the documents had the meaning which opponents seek to read into them, but which the Court below refused to follow, other issues are raised which they must answer. However, those issues are not primarily involved and their consideration is not necessary to the decision of the case presented by the record.

We submit that the petitioner is merely seeking a reconsideration of the general merits of its case, rather than the determination of any basic questions of law. This petition falls well within the eighty per cent desiring another hearing of their cases mentioned by Mr. Chief Justice Taft, in *Magnum Co.* v. *Coty*, 262 U. S. 159, 163 (1923):

> "The jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals was given for two purposes, first to secure uniformality of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

We cannot agree that the four basic questions as stated by petitioner on page 2 of the petition are involved in this case; are necessary to the determination of the issues raised by the pleadings or the facts; or were determined by the Circuit Court of Appeals. Question A seeks to raise the question of contract construction. We submit that as stated it is not based on the facts shown by this record. To construe this particular contract, it is necessary to consider its exact wording and the circumstances surrounding its creation.* It is not possible to phrase such a question adequately without stating the entire case. We propose to state the essential facts appearing in the record to demonstrate that the issue involved was clearly decided below and that there is no fundamental question of law justifying the consideration of this Court or any special or important reasons for the issue of this writ of certiorari.

Unless this Court rehears the merits of the case and construes the contract to mean the exact opposite of the construction placed upon it by the Circuit Court of Appeals, the record in this case raises no other issues. Consequently, we submit that petitioner's Questions B, C, and D are not involved, and we make no attempt to reframe them to relate to the secondary defenses interposed in the defense of this action.

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*Restatement of Law—Contracts, Section 230; *Railroad Companies* v. *Schutte*, 103 U. S. 118, 140 (1880); *Maryland* v. *B. & O. Railway Company*, 89 U. S. 105, 113, 22 Wall. 105 (1874); *The Binghamton Bridge*, 70 U. S. 51, 74, 3 Wall. 51 (1865); *Morgan* v. *Boyer*, 39 O. S. 324, 326 (1883); *Blosser* v. *Enderlein*, 113 O. S. 121, 132 (1925); III Williston on Contracts, Rev. Ed., Sec. 607, *et seq.* See similar document in *Hale* v. *Finch*, 104 U. S. 261 (1881).

III.

STATEMENT OF FACTS.

We cannot agree that the statement of facts contained in the petition fairly sets forth a summary statement of all the essential matter involved. Largely in addition to the facts in the petition, we submit the following summary of the agreed statement of facts (R. 16), the statutory law of Ohio, and the decisions of the lower courts.

It should be noticed that this is *not* the usual situation in which the obligee of a bond seeks to recover from the surety for the loss covered by the bond. In this case the surety is attempting to frame an action by which it may recover from the named beneficiary of the bond for the payment which it made under its suretyship undertaking, despite the fact that such a recovery would throw upon the named obligee the very loss against which it sought to protect itself by requiring the bond.

The primary contract here involved is one between a political subdivision and public corporation of the State of Ohio, The Miami Conservancy District, and an excavating contractor for the removal of excess material from a river channel.

On April 14, 1932, this agreement was executed by the contractor, approved by the Board of Directors of the District, and executed in duplicate by the president of the Board (R. 16 and 27). This execution was in accordance with the terms of Section 6828-16 of the General Code of Ohio, which expressly provides the formalities by which work contracts of conservancy districts shall be created.

> Section 6828-16. To Advertise and Let Contracts. *When it is determined to let the work by con-*

> *tract*, contracts in amounts to exceed one thousand dollars shall be advertised after notice calling for bids shall have been published, once a week for five consecutive weeks completed on date of last publication, in at least one newspaper of general circulation within said district, where the work is to be done, *and the board may let said contract to the lowest or best bidder who shall give a good and approved bond, with ample security, conditioned on the carrying out of the contract.* But said contract shall not be let to another than the lowest bidder unless upon a hearing before the court and upon notice to all parties interested, an order be obtained therefor. *Such contract shall be in writing*, and shall be accompanied by or shall refer to plans and specifications for the work to be done, prepared by the chief engineer. *Said contract shall be approved by the board of directors and signed by the president of the board and by the contractor, and shall be executed in duplicate.* Provided, that in case of sudden emergency when it is necessary in order to protect the district, the advertising of contracts may be waived upon the unanimous consent of the board of directors, with the approval of the court or judge in vacation.

(The part of this section important for present purposes has been italicized.)

By the express terms of the contract, the Conservancy District agreed to pay progress estimates during the prosecution of the work, but to withhold until final payment twenty per cent of the estimated value of the work done on the several dates of progress estimates (R. 34, 35, Secs. 17, 18). Section 18 (R. 35) provides that "*on or before the expiration of thirty days after* date of the acceptance of the work by the Board, the District shall pay to the contractor the amount due him on the final estimate."

Parenthetically, we mention Petitioner's discussion of certain "over depth deductions" (petition page 5). This claim is not included in the Second Amended Petition in

the District Court (R. 1) and was ignored by both lower opinions. The contention is contrary to the construction of the entire agreement and the practical construction of the parties. Since the final payment, March 25, 1933, was of larger amount than the total claimed by petitioner and was properly made, any possible incidental errors would cause no damage to it.

Following the statutory requirement, a provision of the agreement required the contractor to furnish a surety bond (R. 27). The petitioner was a professional paid surety who prepared and executed this bond on its own printed form (R. 21). A photostatic copy of this bond appears on pages 43 and 44 of the record. It defines the "Obligee" as the Miami Conservancy District (lines 7-11). The agreement provided that the bond and other documents should constitute integral parts of the agreement (R. 27). The bond provided that the contract was made a part thereof (R. 43). The bond is dated as of the same day as the contract. Obviously, however, by the necessities of the case as well as the express wording of the bond (R. 43, lines 15-20), that obligation was not executed and was not in existence until some time after the work contract was signed.

For the purposes of this case, the important provision of the bond is lines 27-29, reading:

> "Provided, however, that this Bond is executed upon the following express conditions, each of which shall be a condition precedent to any right of recovery hereon, anything in the contract to the contrary notwithstanding."

Then follow six provisos, each constituting a numbered paragraph. It is Petitioner's contention that in some way

the fourth proviso constituted a promissory obligation of the Conservancy District and altered and superseded the provisions for final payment in the work contract outlined above. The wording of that proviso is not important since we admit that, if it did constitute an *enforceable promise*, it required the retention by the District of a larger amount of money than that now claimed by the Surety beyond the time when final payment actually was made. The only other proviso of interest is the sixth, reading:

> "That no right of action shall accrue upon or by reason hereof, to or for the use or benefit of any one other than the Obligee herein named; * * *"

The Ohio courts, in a suit by subcontractors against the Surety Company, held that provision void as in conflict with the public policy of the State (See second paragraph following).

It is admitted that the work required by the contract was completed to the satisfaction of the District, and that final payment was made within thirty days after the acceptance of the work by the Board of Directors of the District (R. 18). This final payment was thus made strictly in accordance with the final payment provision of the contract as quoted above. This final payment was made in good faith without notice or knowledge of any outstanding claims against the contractor or the Surety (R. 19). The amount of the final payment was more than that claimed by the Surety Company in this action (R. 19 and R. 6).

Four months after final payment, the Surety first notified the District of outstanding claims against the contractor for labor and material (R. 20). The contractor

being insolvent, these claims were made against the Surety, which resisted payment. The ensuing suit was carried to the Supreme Court of Ohio, which refused admittance. The only available opinion is that of the Ohio Court of Appeals, in *New Amsterdam Casualty Co.* v. *Wirtz Transfer Co.*, 5 Ohio Opns. 80, 20 O. L. Abs. 309 (1935). The Ohio court held that since the work contract required the contractor to furnish all labor and material at his own cost and expense, the Ohio law gave a right of recovery under the bond to the laborers and materialmen. The only proviso of the bond with which that court was concerned was the sixth, which sought to limit any right of recovery under the bond to the obligee named therein, The Miami Conservancy District. This proviso was declared to be void as contrary to the public policy of the State of Ohio and to be ineffective to bar the claims of laborers and materialmen against the Surety. Final judgment being entered against the Petitioner Surety Company, it was paid. It sought reimbursement from the Conservancy District. Liability was disclaimed and this suit seasonably brought for the amount which the Surety had paid in satisfaction of the Ohio judgment.

Having admitted by the Agreed Statement of Facts that the final payment was made to the contractor at the time required by the work contract, the Surety Company, to sustain its position in this action, is forced to show that the terms of the work contract were in some way changed and that change was binding on all parties. Its first cause of action is based on the contention that such a change was effected by the fourth incidental proviso, contending that the phrase of the bond quoted above (lines 24-26),

defining a condition as clearly as words can express that concept, actually created a promissory obligation. That purported result is based on the ground that otherwise this clause has no meaning. Liability is then claimed on a breach of a definite promise. Respondent has insistently submitted that the provisos are completely effective as to it in the form of conditions in accordance with their terms. The first five provisos effectively prevented any recovery by the named Obligee unless it was shown that they were strictly complied with. On its face, the sixth proviso prevented action against the Surety by anyone else. But that proviso was held to be contrary to the public policy of the State and void. The Surety simply did not advert to the fact that under the Ohio law its bond obligated it to others than the named obligee and it did not insert in its bond effective provisions for its protection under the circumstances which arose, assuming the District would have agreed to such provisions. The provisos having effective meaning as conditions, this situation supplies no reason for giving them a contrary effect. Furthermore, even though the bond did purport to impose promissory obligations on the Obligee, they were not effective to constitute an alteration of the work contract because they were not executed in compliance with the provisions of General Code, Section 6828-16, *supra*.

As a second cause of action, the Surety Company in this case claimed a right in equity, on the basis that the withheld twenty per cent of the preliminary payments became a trust fund for its protection, and that the final payment above mentioned constituted a breach of trust for which it is entitled to a recovery (R. 5). Respondent's fundamental answer has been that the final payment having been made in accordance with the contract pro-

visions, any equitable claim was cut off. It has also insisted that there was no equitable right created under the facts at issue.

Thus the sole primary issue of the case is whether the provisos of the bond constitute conditions precedent to liability of the Surety thereon or are promissory obligations of the obligee. This is simply a question of the interpretation of the written agreements of the parties, under the common rules of construction.

A.

Decisions of Lower Courts.

The District Court found in favor of the Surety Company. The decision (R. 54) consists principally of a repetition of the Agreed Statement of Facts as the Court's finding of fact, and excerpts from the decision of the Ohio Court of Appeals. In construing the contract, the decision uses the determination of the Ohio Court as its basis and reaches the conclusion that (R. 66) "the so-called 'conditions' became and were obligations of defendant herein to plaintiff herein." Respondent respectfully submits that this conclusion is a complete *non sequitur*. In considering the equitable cause of action, the District Court also found that the amount which the contract provided was to be retained by the Conservancy District became a trust fund; that this amount having been paid to the contractor before he was entitled to be paid constituted a breach of trust for which the Surety was entitled to recover. Our fundamental disagreement with this decision is that the terms of the work contract are the only effective promises made by the District, and so the payment made within thirty days after the acceptance of the work was a proper payment. We do not understand that

any "trust fund" was created, but the determination of that question is not essential to the decision.

The next to the last paragraph (R. 67) of the District Court's opinion apparently is based upon a misreading of a sentence (bottom, R. 35) of the contract. This error is corrected by the Circuit Court of Appeals (R. 83).

On appeal, the Circuit Court of Appeals reversed the District Court and ordered it to dismiss the action (R. 83 and 95). After reciting the facts, the opinion of this court reduced the case to its elemental issue. Upon construing the documents to determine whether the provisos were conditions or promises, it found that the contract (R. 81) "obligated the District to pay for the work on or before thirty days after its acceptance * * *"; that it was permissible for the District to hold the money for a further period, but if payment was made at once, "it may not, we think, be challenged" (R. 81). Had the provisos been held to be legally effective promises, the respondent would unquestionably have been required to withhold payment until the end of the thirty-day period at least. The Court finds no such obligation.

By using negative expressions, the Court expressly rejected the Surety's contention that the provisos constitute promissory obligations of the Conservancy District. In speaking of the fourth proviso, it is said (R. 81, bottom):

> "Were we to view it as a promissory obligation of the District it would require consideration of Section 8324 of the Ohio G. C., * * * Whether the notice permitted under Section 8324 or the requirement of Section 8325 authorize a lien to be acquired by a subcontractor, materialman, or laborer on a public improvement, we have no need to decide."

Following the last quoted statements comes the discussion of General Code Section 8324 and the case of *Village of Beachwood* v. *Ohio Casualty Co.*, 47 Ohio App. 212 (1934). This introduction to that discussion clearly earmarks the following comments as *obiter dicta* to the reasoning essential for the decision. The Court expressly states that it has no need to decide whether or not the Code Sections authorize a lien (R. 82).

The second issue presented by the Second Amended Petition filed in the District Court, claiming a right of recovery under a trust theory, is met squarely by the determination of the Circuit Court of Appeals that the final payment to the contractor was made in accordance with the contract provisions. It being admitted that this payment was made in good faith and with no knowledge of unpaid claims, any possible equitable claim was extinguished and the Court finds no basis for any contention of breach of trust (R. 83).

In its consideration of these two issues, the Circuit Court of Appeals amply and ably disposes of the only dispute necessary to the determination of this case. Naturally, in so deciding the case, the Court did not follow opposing counsel and found it unnecessary to decide issues which they are insisting are involved in the case. The determination by the lower court obviates their consideration, and disposes of much of the contention made in the opposing brief. It is too well established to require citation of authority, that this Court will not consider legal questions which it finds are unnecessary to the determination of the issues presented by the pleadings and facts in the particular case before it. Possible error in the pronouncement of *obiter dicta* below is not persuasive in ap-

pealing to the discretion of this Court for the issue of a writ of certiorari.

We have thus gone into the facts to indicate that this litigation revolves solely about the construction of the terms of a specific contract and was correctly decided below. We deny that the terms of this bond are in any sense universal. It is submitted that the determination of these issues by this court will establish no legal concept or useful precedent in the decision of any other disputes. It is no matter of general interest, but is dependent upon its peculiar facts and circumstances.

IV.

REASONS GIVEN FOR GRANTING PETITION ARE INAPPLICABLE.

(Reply to Petitioner's Brief.)

It is Respondent's contention that the facts heretofore outlined determine that it is unnecessary and undersirable to grant this petition. However, for such help as it may be to this Court, Respondent desires to indicate also that the reasons given by Petitioner for granting the petition (petition, page 7) are not well-founded. We use the same outline as the opposing brief.

A. There is no conflict between decision below and decisions of other circuits.

There is no conflict between the decision below and the cases cited by petitioner, on page 9 of its brief, because the facts in each of those cases contained essential elements which are lacking in the present record.

The quotation from *Globe Indemnity Co.* v. *Unity Railways Co.*, 272 Fed. 607 (1921, C. C. A. 3), was mere

dicta and not necessary to the decision because the Surety there had consented to the payments made to the contractor (page 610) and the payments were held not to affect recovery.

In *Ft. Worth Independent School District* v. *Aetna C. & S. Co.*, 48 F. 2d 1 (1931, C. C. A. 5), and *National Surety Co.* v. *County Board of Education*, 15 F. 2d 993 (1926 C. C. A. 4), the payments were admittedly made by the public body to the contractor before they were due, and on this fact the court based its decision allowing a recovery by the Surety. These decisions cannot conflict with that in the principal case where the payment was properly made.

In *Claiborne Parish School Board* v. *Fidelity & Deposit Co.*, 40 F. 2d 577 (1930, C. C. A. 5), the decision was based on the fact that the school board made the final payment to the contractor with the knowledge that there were unpaid claims which the Surety would have to pay and for which it would look to the retained percentage for reimbursement. In the case at issue, it is admitted that there was no such knowledge (R. 19 and 83).

B. Further consideration of this litigation is important only to the parties.

We respectfully but emphatically deny that the questions which are actually involved in the determination of the issues of this case, and which were found to be involved by both of the lower courts, are of any general or widespread interest. As previously pointed out, this case is dependent upon its peculiar facts. None of the questions discussed under subdivisions 2, 3 and 4, *infra*, needs be determined until or unless this court finds the Circuit

Court of Appeals in error in holding the provisos to be conditions only.

In all of the search that counsel for both parties have made, only one case has been called to attention in which it was attempted to construe the incidental provisos of the bond as imposing promissory obligations on the obligee, which affected the terms of the contract which it was given to secure. That decision (*Milske* v. *Steiner Mantel Company*, 103 Md. 235, 247 (1906)) firmly rejected such a contention, saying:

> "The bond was given, not to vary, or change in any particular the obligations of the plaintiff under the contract, but to secure the faithful performance by him of all the duties assumed by him thereunder. Its object was to protect the defendant from loss, or damage which might result from non-performance by the plaintiff, and cannot be construed to add to, or change any of the terms of the contract, or be taken as a part thereof."

This lack of previous litigation of similar cases indicates one of two things: (1) That the proposition put forward by the Surety is so exceptional and without merit that it is seldom one has the temerity to present it; (2) That situations which might give rise to litigation similar to the issues here raised arise so infrequently that a determination of the issues cannot be said to be sufficiently important to appeal to the discretion of this court.

1. PETITIONER'S POSITION IS CONTRARY TO THAT IT MUST TAKE ON MERITS.

The statement of opposing counsel that this bond "was a common form used throughout the United States" has no support whatsoever in the record of this case, and our understanding is diametrically opposed to the

statement made. The words used to express the legal significance of the fourth proviso of the bond, which is at issue here, as clearly connotate a condition at law as words can express that concept. The lack of any uncertainty as to the meaning of this phrase and the particular facts involved distinguish the case at issue from those cited in opposing brief (pages 10, 11), and indicate the unique character of this litigation and the issues raised.

Granting this bond to be based on a uniform form, the decision of this case will constitute no useful precedent. Opponent's theory of the merits of the case is, as stated on page 6 of its brief in the Circuit Court of Appeals: "This is obviously not a case of interpreting simply a printed bond submitted by a surety to an obligee, but it is a proposition of interpreting jointly a printed bond and a work contract form supplied by the obligee." Since the work contract is obviously unique to this particular case, the Surety's contention that a decision by this court will settle important questions of wide application is absolutely inconsistent with the position it must take on the merits of the case.

2. Merging Bond and Contract Does Not Convert Conditions into Promises.

Full discussion of the argument made under petitioner's point II-B would require a consideration of the merits of the case. It seems sufficient for the present to point out that there is nothing related in this argument which indicates any justifiable reason why the words of the bond which clearly designate a condition should be construed as creating a promissory obligation. Granted, for the moment, that the bond and contract constituted one obligation, the portion of that obligation consisting

of the six provisos of the bond was clearly identified as conditions to the Surety's liability only, and even though some of the obligations of the Conservancy District ran directly to the Surety there was nothing in that circumstance that would convert these conditions into promises.

3. District Liable Only on Contracts Complying with Statutory Formalities.

Furthermore, even though it is assumed that a contract was created, obligating the Conservancy District to perform the six provisos of the bond, such a contract was not effective to bind the District under the Ohio law. We submit that opposing counsel are not justified in representing that Questions B and C, on page 2 of the petition, are involved in this case. Petitioner qualifies these questions by the clause—"in the absence of a restrictive statute." The exercise of the powers of the Conservancy District are restricted by Section 6828-16 (*supra*), which provides that a work contract must be "approved by the Board of Directors and signed by the president of the Board and by the contractor, and shall be executed in duplicate." This contract was for the work of the District. All of the terms of the agreement would have to be executed in conformity with this statutory provision. The record shows that the provisos were not approved by the Board of Directors and certainly were not executed by the president (R. 16). The bond was not in existence when the contract was executed. Had the Board of Directors approved an agreement embodying promises to the same effect as the provisos of the bond, and it was executed in accordance with the statutory requirement, we have no question but that it would bind the District. But if such an agreement had been so made, the District

would have been advised of its obligation, would have complied with it, and this dispute would not have arisen. Not having followed the provisions of the statute, the Ohio law is clear that such a purported agreement would be void and could not form the basis of a contract claim or one based on quasi contract or implied contract. This is the holding of *Village of Beachwood* v. *Ohio Casualty Company*, 47 Ohio App. 212 (1934). This decision was not sporadic but is based on repeatedly announced principles by the Supreme Court of Ohio.*

4. All Possible Lien Rights Expired with Final Payment to Contractor.

The petition for a writ of certiorari quotes from Section 8324 of the Ohio General Code, but does not quote the following Section, 8325, which gives the effect of the section quoted. It reads as follows:

> "Upon receiving the notice required by the next preceding section, such owner, board or officer or public authority or authorized clerk, agent or attorney thereof, *shall detain in his hands all subsequent payments* from the principal or subcontractor to secure such claims and the claims and estimates of other subcontractors, materialmen, laborers, mechanics, or persons furnishing materials to or performing labor for any contractor or subcontractor who intervenes before the next subsequent payment under the contract, or within ten days thereafter." (Italics supplied)

It is thus apparent that the only section of the Ohio Code which would permit laborers and materialmen to

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*McCloud v. Columbus, 54 O. S. 439 (1896); Welston v. Morgan, 65 O. S. 219 (1901); Buchanan Bridge Company v. Campbell et al., 60 O. S. 406 (1899); Frisbie Co. v. East Cleveland, 98 O. S. 266 (1918); Hommel & Co. v. Woodsfield, 115 O. S. 675 (1927).

have any lien against conservancy districts, or any of their property, applies only to payments unpaid to the principal contractor and in the hands of the public body at the time it is served with notice of the claim. There is no requirement that any part of the contract price should be withheld for four months. It is to be paid as provided in the contract, and when so paid the lien right is automatically extinguished for there is nothing to which the lien may attach. It is admitted in this case that the Miami Conservancy District not only received no such notice but, at the time it made the final payment to the contractor, had no knowledge of any unpaid labor or material claim. The time for effectively filing such liens expired with the final payment of the contractor by the District. There was no lien claim to which the Surety might be subrogated. The holding of *Village of Beachwood* v. *Casualty Co., supra,* to this effect is obviously correct. In this connection, we respectfully object to the inference created by opponent's quotation from *Hochevar* v. *Maryland Casualty Company*, 114 F. 2d 948 (1940, C. C. A. 6) (opposing brief, page 16), since they omit the preceding clause of the same sentence of the Hochevar opinion reading "* * * because of the dissimilar facts involved, no importance," etc. (page 951). The Circuit Court of Appeals did not criticize the Beachwood case, but clearly distinguished it from the case they were then deciding (See our next section).

C. The lower court has properly applied the law in all cases herein considered.

We respectfully, but emphatically, deny the statement of opposing counsel (their brief, page 19) that the Circuit Court of Appeals in its decision of *Hochevar* v.

Maryland Casualty Company (*supra*) repudiated the Ohio law as pronounced in *Village of Beachwood* v. *Ohio Casualty Co.* (*supra*). In the Hochevar opinion the Court distinctly states that "The decision of the Ohio Court of Appeals in *Village of Beachwood* v. *Ohio Casualty Insurance Co.*, 47 Ohio App. 212, 191 N. E. 797, is not applicable, inasmuch as the Village was not obligated by the contract, as was the county here, to retain the percentages until the materialmen and laborers were paid * * *" (page 951).

We have indicated that on the facts there involved, the Beachwood decision was sound. Also, as the Circuit Court of Appeals' opinions indicate, the Hochevar case and that at bar have no relation to each other because of vital differences in the facts out of which the two cases arose. In the first place, in the Hochevar case the county had notice of the outstanding claims of laborers and materialmen at the time they made the final payment. The Miami Conservancy District admittedly had no such notice (R. 19). In the second place, under the Hochevar case the county paid the contractor before he was entitled to the money under the contract terms, whereas the Miami Conservancy District was required to pay the contractor "on or before the expiration of 30 days after date of the acceptance of the work by the Board" (R. 35), and payment was not made until after that date (R. 19).

V.

CONCLUSION.

In submitting that there are no "special and important reasons" for granting a writ of certiorari in this case, we rely principally on the fact that the issues involved

must be determined on the basis of facts which are peculiar to this particular litigation. This position is set forth under Point III of our Index, Statement of Facts. This case does not fall within any of the classes indicated by Rule 38, Section 5, of the Rules of this Court.

We do not believe that it is necessary for the Court to go further in its consideration of the petition for a writ of certiorari, but incidentally it is submitted that we have clearly indicated that the decision reached by the Circuit Court of Appeals was eminently just and correct and that the reasoning of the opposing brief is not persuasive.

Respectfully submitted,

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